89- 1373

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR LISTER,

Petitioner,

vs.

H. ALLAN STARK, JAMES NUGENT, SUN ELECTRIC CORPORATION and SUN ELECTRIC PENSION TRUST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARTHUR T. SUSMAN
Counsel of Record
TERRENCE BUEHLER
SUSMAN, SAUNDERS & BUEHLER
Two First National Plaza
Suite 620
Chicago, Illinois 60603
(312) 346-3466

JOSEPH S. BUEHLER
FRANKS & FILLER
19333 East Grant Highway
P.O. Box 5
Marengo, Illinois 60152
(815) 923-2107

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

34 pp

QUESTION PRESENTED

Does ERISA preempt common law claims against an employer based on that employer's false pre-employment promises and representations concerning pension benefits to an individual who is not a member of the company's benefits plan?

LIST OF PARTIES

Petitioner, Plaintiff:

Arthur Lister

Respondents, Defendants:

H. Allan Stark
James Nugent
Sun Electric Corporation
Sun Electric Pension Trust

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on November 28, 1989.

CITATION TO OPINION BELOW

The panel opinion of the Court of Appeals is reproduced in the Appendix at pp. 1-10 and is reported at 890 F.2d 941 (7th Cir. 1989).

JURISDICTION

The panel opinion was entered on November 28, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statutory provision involved is Section 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144, and is reproduced in the Appendix at pp. 18-21.

STATEMENT

Arthur Lister began working for Sun Electric Corporation ("Sun Electric" or the "Company") in July 1964 and worked as a salesman for the Company until April, 1970. He left Sun Electric in April, 1970. He returned to work with Sun Electric in January 1971, but only after representatives of the Company promised him that, if he returned, he would receive pension benefits as if he had been an employee without interruption from 1964. Based on this promise, Lister returned to the Company and worked there continuously until 1982. In 1982, Lister was forced into retirement as part of a cost cutting plan.

In November, 1987, Lister applied for a determination of his early retirement pension benefits. The benefits that

Lister was informed he would receive were substantially less than what he had expected. The lower benefits resulted from, *inter alia*, the failure to give him service credit for the initial six years he worked for Sun Electric, *i.e.*, July 1964 to March 1970.

On December 5, 1988, Lister filed a two count complaint in Illinois state court against the Company seeking damages for fraud and breach of contract based upon the Company's 1971 representations. Defendants removed the action to federal district court pursuant to 28 U.S.C. § 1441 and defendants moved to dismiss the suit on the ground that Lister's state law claims for fraud and breach of contract were preempted by ERISA. Lister opposed the motion and moved to remand the action.

On March 23, 1989, the district court issued its memorandum opinion and order, dismissing Lister's complaint, holding that Lister's claims "related to" a benefits plan as that term is defined in *Metropolitan Life Insurance Co. v. Taylor*, 107 S.Ct. 1549 (1987) and *Pilot Life Insurance Co. v. Dedeaux*, 107 S.Ct. 1549 (1987).

The Seventh Circuit Court of Appeals affirmed the lower court's dismissal, holding that Lister's claims were completely preempted by ERISA because Lister was an ERISA plan participant.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE SPLIT OF AUTHORITY IN THE CIRCUITS OVER WHETHER ERISA PREEMPTS CLAIMS AGAINST AN EMPLOYER BASED ON THAT EMPLOYER'S FALSE PRE-EMPLOYMENT PROMISES AND REPRESENTATIONS CONCERNING PENSION BENEFITS TO AN INDIVIDUAL WHO IS NOT A MEMBER OF THE COMPANY'S BENEFITS PLAN.

The crux of Lister's claim is that he returned to work in reliance upon the Company's promise to give him uninterrupted service credit dating back to his original hire date. Because these promises were made to him before he returned to work for the Company and before he became a member of the Company's plan, Lister filed a two count complaint in Illinois state court alleging fraud and breach of contract. In their decisions, the lower court, and subsequently the Seventh Circuit, overlooked the crucial fact that Lister was asserting claims based on representations made before he was a plan participant and was making a claim against the Company itself. Each court held that Lister's claims were, in reality, claims for increased pension benefits based on an oral modification of the Sun Electric Pension Trust. Having thus recast the problem, both courts were then able to conclude that Lister's state law claims for benefits were preempted by ERISA and constituted an oral modification of the Plan.

The issue is not susceptible to such easy resolution and the case presents an important question concerning the scope of ERISA preemption left open by this Court's prior decisions in *Pilot Life Insurance Co. v. Dedeaux*, 107 S.Ct. 1549 (1987) and *Fort Halifax Packing Co. v. Coyne*, 107 S.Ct. 2211 (1987) and about which there is presently a split of authority in the circuits.

Lister's state law claims are based on representations made to him before he was a benefits plan participant. The Sixth and Ninth Circuits have concluded on these facts that the state claims are not preempted. *See, Perry v. P*I*E Nationwide*, 872 F.2d 157 (6th Cir. 1989); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504-06 (9th Cir. 1985); *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group*, 721 F.2d 654 (9th Cir. 1983). These cases reason that claims based on misrepresentations occurring before the employee is a plan participant do not have an impact on the plan because the suit does not challenge the construction of any plan terms or any aspect of plan administration. While it is true that damages would be calculated in accordance with the benefit plan formula, damages would be paid by the company not the plan.

However, another line of cases has developed in the Eleventh and Fifth Circuits and possibly also the Eighth Circuit that are irreconcilably contrary. *See, Cefalu v. B.F.Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987); *Jackson v. Martin Marietta Corp.*, 805 F.2d 1498 (11th Cir. 1986). These cases, as the Seventh Circuit did in the decision at bar, concluded that the employee was seeking a redetermination of benefits based on prior representations. Having concluded that the employee's action was for additional benefits, the court in each of these cases found the claims preempted and dismissed them.

It is important to resolve this conflict. Congress intended uniformity as exhibited by the breadth of the preemption statute. That the outcome of an employee's claim based upon the same set of facts should differ from Circuit to Circuit defeats the very uniformity Congress intended by the preemption provisions in ERISA, if ERISA applies to these fact situations at all. *Shaw v. Delta Air Lines*,

463 U.S. 85, 98-99 (1982). Further, one line of cases or the other should be uniformly followed—both lines of authority cannot be correct. This is precisely the situation which this Court should address. Lister therefore requests that this Court grant his petition for *certiorari* to resolve this important question on the scope of preemption and resolve the conflict among the Circuits.

Moreover, the lower courts in the case at bar have misconstrued the purpose and scope of ERISA. Congress drafted the preemption language of ERISA broadly because it sought to ensure that the administration of benefits plans would be governed by a single, unified set of regulations, rather than a patchwork scheme of differing and possibly conflicting rules. In so doing, Congress sought to encourage employers to create and maintain benefits plans. *Fort Halifax Packing Co. v. Coyne*, 107 S.Ct. 2211, 2217 (1987).

ERISA therefore preempts state law when that state law "relate[s] to any employee benefits plan". 29 U.S.C. § 1144(a). This Court has observed that: "The phrase 'relate to' was given its broad common-sense meaning such that a state law 'relate[s] to' a benefits plan in the normal sense of the phrase, 'if it has a connection with or reference to such a plan' ". *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1984), (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1982)). In short, a law "relates" to a benefits plan if it implicates the terms or the administration of a plan.

However, if a state law does not raise a potential for conflict with the ERISA regulatory scheme that has been designed to promote the administrative integrity of benefit plans, then there is no reason to preclude the state law from operating by preempting it. *Fort Halifax Packing Co. v. Coyne*, 107 S.Ct. 2211, 2219, 2221 (1987). The claims

raised by Lister in this case simply do not have any impact on, or relation to, the Company's benefits plan or its administration. Lister's claims will have no impact on the rights of others covered by the benefits plan; his claims will have no impact on the benefits of any other plan participant because he seeks benefits from the Company only. In short, Lister's claims are outside the scope and purpose of ERISA. By subjecting Lister's claims to ERISA's preemption provisions and dismissing his claims, the lower courts stretched ERISA beyond its intended boundaries and deprived Lister of any remedy without thereby serving any of the policies underlying ERISA.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ARTHUR T. SUSMAN
Counsel of Record
TERRENCE BUEHLER
SUSMAN, SAUNDERS & BUEHLER
Two First National Plaza
Suite 620
Chicago, Illinois 60603
(312) 346-3466

JOSEPH S. BUEHLER
FRANKS & FILLER
19333 East Grant Highway
P.O. Box 5
Marengo, Illinois 60152
(815) 923-2107

Attorneys for Petitioner

February 26, 1990

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-1821

ARTHUR LISTER,

Plaintiff-Appellant,

v.

H. ALLAN STARK, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 10616—**George M. Marovich**, *Judge.*

ARGUED SEPTEMBER 27, 1989—DECIDED NOVEMBER 28, 1989

Before CUMMINGS, CUDAHY, and FLAUM, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Arthur Lister sued the Sun Electric Corporation, the Sun Electric Corporation Pension Trust ("Trust") and two trustees of the Trust in state court, seeking a declaration that he was entitled to "uninterrupted service credit for the period from July 1964 to January 1971 for the purpose of calculating his pension benefits." Complaint ¶¶ 20(a) and 25(a). The defendants removed the case to federal district court, alleging that Lister's claims were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. The defendants then moved to have the case

dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Lister moved to have the case remanded to state court on the ground that his claims were not preempted by ERISA. The district court denied Lister's motion and granted the defendants' motion. We affirm.

I. Facts

Arthur Lister worked for the defendant, Sun Electric Corporation, from July 1964 until March 1970. In March 1970 he left Sun Electric but returned nine months later. Lister's complaint alleges that his return was induced in part by Sun Electric's promise that, contrary to the terms of the Sun Electric pension plan, Lister would receive pension service credit for the years 1964 through 1970, as well as for any years he was employed by Sun Electric after 1970.

In 1982, Lister was retired from Sun Electric as part of a cost-cutting program. Because he found employment elsewhere, Lister did not seek his Sun Electric pension benefits until 1987. Upon application for his benefits, Lister was informed by Allan Stark, Vice President and General Counsel of Sun Electric and Trustee for the Sun Electric Corporation Pension Trust, that the calculation of his benefits would not include his years of service prior to his rehiring in 1971. Exclusion of credit for the earlier years is consistent with the terms of Sun Electric's pension plan but not consistent with the alleged oral promise to include these prior years of service in the calculation.

In conformity with *Hishon v. King & Spalding*, 467 U.S. 69, the district court accepted these factual allegations of the complaint, along with all reasonable inferences therefrom, as true. See also *Banner Indus., Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 875 F.2d 1285 (7th Cir. 1989). Nevertheless, the district court determined that Lister's claims were preempted by ERISA. Because ERISA does not allow oral modifications of pension plans, the district court dismissed the case.

II. Discussion

A. *Removal to Federal Court*

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). The parties to this lawsuit are not diverse; hence the original jurisdiction necessary for removal, if any, must be based on "federal question" jurisdiction. Federal question jurisdiction requires that the case arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. As a general matter, a cause of action can only be said to arise under the laws of the United States if the *plaintiff's* complaint raises a federal issue. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1; *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149. Since federal preemption is most commonly raised as a defense to a plaintiff's claim, the federal issue does not appear on the face of the plaintiff's complaint in cases where this defense is raised. Therefore, a preemption defense cannot be the basis of the original federal jurisdiction necessary for removal to federal court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63. But the Supreme Court has fashioned an exception to this rule where Congress has completely preempted a given area of state law. This "complete preemption" exception permits recharacterization of a plaintiff's state-law claim to a federal claim so that removal is proper.[1] Determination of whether a cause of action

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[1] The use of the term "complete preemption" is unfortunate, since the complete preemption doctrine is not a preemption doctrine but rather a federal jurisdiction doctrine. Thus, a case must be remanded to state court if the sole basis for federal jurisdiction is a preemption defense and if the federal court finds that the preemption is insufficiently complete to confer federal question jurisdiction. This jurisdictional decision by the federal court does not

(Footnote continued on following page)

has been completely preempted is based on the intent of Congress. *Id.* at 66. In *Taylor*, the Supreme Court held that the language of the jurisdictional subsection of ERISA's civil enforcement provisions[2] clearly indicates a Congressional intent to make all suits that are cognizable under ERISA's civil enforcement provisions federal question suits. *Id.*

Thus, proper resolution of the jurisdictional aspect of this case requires two inquiries. The first is whether Lister's complaint raises a federal issue. If it does, then federal jurisdiction is clear and removal was proper. If Lister's complaint does not raise a federal issue, then the second inquiry is whether removal was nevertheless proper under the complete preemption doctrine. Count I of Lister's complaint alleges fraud and Count II alleges breach of an oral contract. Neither count explicitly refers to ERISA although each count asks the court to declare that Lister is entitled to "uninterrupted service credit . . . for the purpose of calculating his pension benefits." Plaintiff's complaint at 5 and 6. Although Lister claims entitlement to additional pension benefits, no federal cause of action explicitly appears on the face of his complaint. Nevertheless, Lister's case was properly removed to federal

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[1] *continued*

preclude the state court from finding that the state law cause of action is preempted by federal law. In such an event the state court will simply apply federal law in resolving the dispute. Of course if the federal court, in resolving the jurisdictional question, decides that the state cause of action is completely preempted, it will be unnecessary for the federal court to follow this jurisdictional analysis with a preemption analysis.

[2] ERISA's civil enforcement provisions are contained in section 502 of the Act. 29 U.S.C. § 1132. The jurisdictional subsection of this section provides:

> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

ERISA § 502(f), 29 U.S.C. § 1132(f).

court because under *Taylor*, Lister's claims are completely preempted. Lister is an ERISA plan participant. ERISA's civil enforcement provisions specifically provide plan participants and beneficiaries with a cause of action to seek increases in their pension benefits.[3] Lister's claims are thus cognizable under ERISA's civil enforcement provisions and are therefore completely preempted. Since this complete preemption confers the necessary original federal jurisdiction, removal of Lister's claims to federal court was proper.[4]

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[3] Section 502 of ERISA, 29 U.S.C. § 1102, provides in pertinent part:

> A civil action may be brought—
>
> (1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .
>
> (3) by a participant, beneficiary, or fiduciary, (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan; . . . .

[4] Other circuits have employed the *Taylor* complete preemption analysis to determine validity of a contested removal. See, *e.g.*, *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989) (action completely preempted by ERISA and therefore removable to federal court); *Allstate Ins. Co. v. 65 Security Plan*, 879 F.2d 90 (3d Cir. 1989) (action not completely preempted by ERISA since plaintiff had no standing under ERISA statute and case remanded to state court); *Hartle v. Packard Electric*, 877 F.2d 354 (5th Cir. 1989) (action not preempted by ERISA within the meaning of *Taylor* and therefore remanded to state court); *Makar v. Health Care Corp. of Mid Atlantic*, 872 F.2d 80 (4th Cir. 1989) (action completely preempted by ERISA and therefore removable to federal court); *Deford v. Soo Line Railroad Co.*, 867 F.2d 1080 (8th Cir. 1989) (complete preemption analysis extended to Railway Labor Act to confirm validity of removal of action to federal court), certiorari denied, 109 S. Ct. 3265; *Hansen v. Blue Cross of California*, No. 88-5910 (9th Cir. Oct. 2, 1989) (affirming district court remand to state court for lack of federal question jurisdiction).

B. *Preemption*

Having determined that Lister's claims are completely preempted for federal jurisdiction purposes, it is evident that they are substantively preempted as well.[5] Therefore, it is not necessary to analyze the particulars of this substantive preemption. Nevertheless, since the parties to this action relied primarily on cases in which the courts by-passed the jurisdictional issue and focused on substantive preemption, a discussion of these cases is warranted.

Several circuits have held that ERISA preempts suits alleging breaches of oral modifications of pension plans. See, *e.g.*, *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989) (plaintiff orally assured of retirement benefits equal to those of employees with other positions); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987) (plaintiff orally promised fringe benefits equal to those he would have received as a union member); *Jackson v. Martin Marietta Corp.*, 805 F.2d 1498 (11th Cir. 1986) (plaintiff orally promised an earlier pension service date than the date provided by the plan).[6] In each of these cases the preemption holding was based on the fact that the state law claim would have had a direct impact on the administration of an ERISA pension plan in contravention of the clear intention of Congress to make such administration the exclusive province of federal law.

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[5] As noted earlier, *supra* note 1, the converse is not necessarily true. ERISA preemption that has not been determined to be "complete" is not sufficient to confer removal jurisdiction. *Taylor*, 481 U.S. at 64. ("ERISA pre-emption, without more, does not convert a state claim into an action arising under federal law.").

[6] *Jackson* was originally brought in federal court with federal jurisdiction based on diversity of citizenship. Both *Anderson* and *Cefalu* involved removal of a state claim to federal court. Neither case explicitly states that federal jurisdiction is based on diversity. If indeed the parties were not diverse in these cases, then the *Anderson* and *Cefalu* courts should have analyzed the jurisdictional basis for removal. Instead, these courts seem to have found removal proper merely because the claims at issue were preempted by ERISA. Such a finding is inconsistent with *Taylor*.

Lister argues that the holding in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, indicates that not all breaches of oral modifications of ERISA pension plans are preempted. *Fort Halifax* held that ERISA did not preempt a state statute requiring payment of a one-time severance benefit in the event of a plant closing to employees not otherwise covered by a severance agreement.[7] The state statute at issue in *Fort Halifax* did not purport to modify an existing pension plan. Moreover, it did not interfere with the administration of a pension plan. Thus Lister's characterization of the *Fort Halifax* holding is inaccurate.

Lister also cites *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989), in support of his claim. *Pizlo*, however, did not involve an oral modification of a pension plan. Rather, it involved an oral promise that employees would not be terminated. It was an alleged breach of this oral employment contract that the Fourth Circuit held was not preempted by ERISA. "The claims do not bring into question whether Plaintiffs are eligible for plan benefits, but whether they were wrongfully terminated after an alleged oral contract for a term." *Id.* at 120. *Pizlo* is thus distinguishable from the instant case.[8]

Finally, Lister relies on two district court cases to support his position that ERISA does not preempt his claims. *Totton v. New York Life Ins. Co.*, 682 F. Supp. 731 (D. Conn. 1987); *Greenblatt v. Budd Co.*, 666 F. Supp. 735 (E.D. Pa. 1987).[9] *Totton* involved a wrongful discharge ac-

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[7] *Fort Halifax* reached the Supreme Court from the Supreme Judicial Court of Maine. Consequently the case did not involve removal jurisdiction. Federal jurisdiction was proper in *Fort Halifax* because the State of Maine was a party to the action.

[8] Federal jurisdiction was proper in *Pizlo* because *Pizlo* was filed in federal court. The state law claim was pendent.

[9] The basis for federal jurisdiction is not evident in the *Totton* opinion. Like *Pizlo*, *Greenblatt* contained an ERISA claim on the face of the complaint. Also like *Pizlo*, the *Greenblatt* court appears to have relied on pendent jurisdiction to acquire the necessary federal jurisdiction to decide whether the state law fraud claim was preempted.

tion and is thus distinguishable in the same manner as *Pizlo*. *Greenblatt*, on the other hand, is not critically distinguishable from the instant case;[10] however, we agree with Judge Marovich's decision to decline to follow *Greenblatt* here.

Judge Marovich's determination that Lister's claims were preempted by ERISA was not, by itself, sufficient to support federal question jurisdiction. Nevertheless, the district court was correct in concluding that Lister's claims were preempted by ERISA.

C. *Lack of Federal Remedy*

In addition to arguing that ERISA does not preempt his state law claims, Lister also maintains that preemption will leave him without a remedy since ERISA does not allow oral modifications of pension plan provisions. See ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (plan must be established and maintained pursuant to a written agreement); ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3) (plan must provide procedure for amendment and identify persons authorized to amend). See also *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) ("requirement that ERISA plans be 'maintained' in writing precludes oral modifications of the Plans"); *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 163 (7th Cir. 1988) (citing *Nachwalter*). While our holding here will leave Lister without a remedy, the availability of a federal remedy is not a prerequisite for federal preemption. The Supreme Court has specifically rejected such an argument. "The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and

[10] It is true that *Greenblatt* involved company funds rather than pension funds, but so did *Cefalu*, *supra*, where the Fifth Circuit decided in favor of preemption. We prefer the *Cefalu* rationale. Therefore, it would not avail Lister to amend his complaint to drop the pension trust defendants. See Appellant's Reply Br. at 3.

beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54. See also *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 n.4 (rejecting a Ninth Circuit suggestion that a federal remedy is a prerequisite to preemption).

D. *Rule 12(b)(6) Dismissal*

Having determined that state law and common law remedies were completely displaced by ERISA in this case, it remains only to determine whether Judge Marovich's grant of the defendant's Rule 12(b)(6) motion to dismiss was proper. We review a Rule 12(b)(6) dismissal *de novo*. *Corcoran v. Chicago Park District*, 875 F.2d 609, 609 (7th Cir. 1989).

In *National Union Fire Ins. Co. v. Continental Illinois Corp.*, 652 F. Supp. 858 (N.D. Ill. 1986), the court held that a finding of federal preemption does not necessarily compel the grant of a Rule 12(b)(6) motion to dismiss. The court relied on *Hishon v. King & Spalding*, 467 U.S. 69, 73, to conclude that a court should dismiss a claim "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." To the contrary is the case cited by Judge Marovich to support his dismissal of Lister's claim, *Armbruster v. Benefit Trust Life Ins. Co.*, 687 F. Supp. 403 (N.D. Ill. 1988). The *Armbruster* court held, "it follows from the fact that ERISA preempts [their] claim that plaintiffs must properly plead their claim under ERISA before the relief requested is available in any court." *Id.* at 405 n.1.

This divergence of views is of no consequence here, since even under the more lenient standard advanced in *National Union* Lister has failed to state a claim upon which relief may be granted. As previously discussed, ERISA does not recognize the validity of an oral modification of a pension plan. Therefore, even if Lister's complaint can be said to state a claim properly under ERISA, the dismissal was justified.

III. Conclusion

Removal of Lister's case to federal court was proper under the complete preemption doctrine as enunciated in *Taylor*. Lister's claims were also properly dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). The judgment of the district court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

NOVEMBER 28, 1989

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

ARTHUR LISTER,

Plaintiff-Appellant,

No. 89-1821 vs.

H. ALLAN STARK, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 10616—George M. Marovich, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTHUR LISTER, Plaintiff,	)	
v.	)	No. 88 C 10616
H. ALLAN STARK, JAMES NUGENT, SUN ELECTRIC CORPORATION and SUN ELECTRIC PENSION TRUST, Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Arthur Lister ("Lister") brought this action in Illinois Circuit Court of McHenry County seeking a declaratory judgment that he is entitled to additional benefits under the Sun Electric Corporate Pension Plan. The defendants, H. Allan Stark, James Nugent, Sun Electric Corporation, and Sun Electric Pension Trust, then removed the action to this court.

Presently before this court are defendants' motion to dismiss and Lister's motion to remand. For the reasons stated herein, defendants' motion to dismiss is granted and Lister's motion to remand is denied.

I. *Statement of Facts*

For purposes of the motions to remand and dismiss, the court accepts the factual allegations of the complaint,

along with all reasonable inferences therefrom, as true. *Armbruster v. Benefit Trust Life Ins. Co.*, 687 F. Supp. 403, 404 (N.D. Ill. 1988), citing *Meriwether v. Faulkner*, 821 F.2d 408, 410 (7th Cir. 1987).

Arthur Lister's employment for Sun Electric Corporation ("Sun Electric") began in July, 1964. He worked as a salesman for the company until April, 1970. At that time, Lister left the employ of Sun Electric and started working for another company.

Several months later, on January 1, 1971, Lister returned to work at Sun Electric after the company promised that, with respect to employment benefits, he would receive credit for uninterrupted service for the prior 6 years with the company. He was also promised that he would not be treated as a new employee upon his return. Lister was later promoted to regional sales manager in 1975.

Lister remained at Sun Electric until he was forced to retire on August 15, 1982. On August 11, 1987, Lister contacted Sun Electric for a preliminary determination of his pension plan benefits. In November 1987, the company denied his claim for credit of uninterrupted service.

II. *Discussion*

Lister filed this two count breach of contract and fraud claims in state court. Defendants removed this action to this court and now seek dismissal. Both the removal and the motion to dismiss are based on a single contention: that Lister's state law breach of contract and fraud claims are pre-empted by the Employment Retirement Income Security Act of 1974 ("ERISA"), 9514(a), 29 Section 1144(a). Lister opposes the motion to dismiss on the ground that the state law claims do not challenge either the terms

of the pension plan or its administration. Rather, the complaint seeks damages from Sun Electric for the service credit he was promised but did not receive. Lister contends that because the claims do not relate to the plan in any meaningful way, the motion to dismiss should be denied and this case remanded to state court.

Section 514 of ERISA provides:

> [T]he provisions of [ERISA] . . . shall supersede any and all state laws insofar as they may now or hereafter *relate to* any employee benefit plan. . .

29 U.S.C. Section 1144(a) (emphasis added). The scope of this pre-emption provision is very broad. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) ("the express pre-emption provisions of ERISA are deliberately expansive and designed to 'establish pension plan regulation as exclusively a federal concern.' ") (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)).

The Supreme Court stated in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1982), that "a law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has connection with or reference to such a plan." The court then emphasized that the pre-emption is not limited to "state laws specifically designed to affect employee benefit plans." *Id.* at 98.

In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), the Supreme Court held that state common law tort and contract actions asserting improper processing of a claim for benefits under an employee benefits plan are pre-empted by ERISA.

Other circuits have found that the state law claims in question are pre-empted by ERISA. In *Jackson v. Martin*

Marietta Corp., 805 F.2d 1498 (11th Cir. 1986), the plaintiff, as in this case, claimed that his employer had promised retroactive service credits which the plan later failed to provide when calculating his benefits. The plaintiff brought a state law claim for breach of contract, rather than ERISA. The Court held that the state law claim directly impacted the administration of an employee benefit plan and, thus, was pre-empted by ERISA. *Id.* at 1500. *See also Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988) (State law breach of contract and misrepresentation claims against employer, for promised benefit increases not granted by plan, pre-empted); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987) (ERISA preempted breach of contract action against employer for benefit increases not granted by plan); *Nevill v. Shell Oil Co.*, 835 F.2d 209 (9th Cir. 1987) (breach of contract, fraud and other state claims preempted).

In this suit, Lister filed not only against Sun Electric but also two trustees of the pension plan as well as the pension trust itself. Lister contends that the plan erred when it denied his claim for more service credits than the plan initially determined he had accrued. Lister seeks a declaration that he is entitled to:

> uninterrupted service credit for the period from July, 1964 to January, 1971 for the purpose of calculating his pension benefits. (Complaint, prayer for relief, ¶ (a))

Moreover, Lister attaches the plan document as an exhibit to the complaint, and alleges that he has "exhausted [his] available intra-plan remedies." *Id.* at ¶ 14. Clearly, Lister's complaint which seeks payment of benefits, on its face, "relate to" an employee benefit plan and, therefore, falls under ERISA's pre-emption clause.

Lister primarily relies on *Greenblatt v. Budd Co.*, 666 F.Supp. 735 (E.D. Pa. 1987); and *Totten v. New York Life Ins. Co.*, 682 F.Supp. 731 (D. Conn. 1987), to support his position that ERISA does not pre-empt the state law claims at issue here.[1]

We decline to follow these cases in light of the Supreme Court's decision in *Pilot Life* and *Metropolitan Life Ins. Co.* as well as the overwhelming appellate court opinions to the contrary. Accordingly, the action was properly removed to this court and defendants' motion to dismiss is granted. *See Armbruster, supra,* 687 F.Supp. at 405, n.1 (". . . plaintiffs must properly plead their claim under ERISA before the relief requested is available in any court").

III. *Conclusion*

For the reasons stated above, defendants' motion to dismiss is granted and plaintiff's motion to remand is denied.

ENTER:

/s/ GEORGE M. MAROVICH
United States District Judge

DATED: March 23, 1989

FOOTNOTE

[1] In *Fort Hailfax Packing Co., Inc. v. Coyne*, ____ U.S. ____, 107 S. Ct. 2211 (1987) the Supreme Court held that a state law claim based on a Maine statute that required employees to provide one time severance payment to employees in the event of plant closings was not pre-empted by ERISA. The Supreme Court found that ERISA did not pre-empt the Maine statute because ERISA was only designed to pre-empt state laws which related to employee benefit *plans*, rather than to employee *benefits*.

Noting the distinction drawn in *Fort Halifax*, the courts in *Greenblatt*, 666 F.Supp. 735 (E.D. Pa. 1987), and *Totten*, 682 F.Supp. 731 (D. Conn. 1987), refused to pre-empt state law claims because the claims did not impact upon an employee pension benefit *plan*. In *Greenblatt*, plaintiff brought a common law fraud action against his former employee, claiming that the company misrepresented to him that his pension benefits would be the same as that received by another group of employees. In *Totten*, former employees brought a wrongful discharge action against their former employer. As stated in this opinion, we decline to follow these two lower court opinions in view of the overwhelming opinions to the contrary.

STATUTE INVOLVED

Section 514, 29 U.S.C. § 1144

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev.Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet

in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(8) Subsection (a) of this section shall not apply to any State law mandating that an employee benefit plan not include any provision which has the effect of limiting or excluding coverage or payment for any health care for an individual who would otherwise be covered or entitled to benefits or services under the terms of the employee benefit plan, because that individual is provided, or is eligible for, benefits or services pursuant to a plan under title XIX of the Social Security Act [42 U.S.C.A. § 1396 *et seq.*], to the extent such law is necessary for the State to be eligible to receive reimbursement under title XIX of that Act.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

(Pub.L. 93-406, Title I, § 514, Sept. 2, 1974, 88 Stat. 897; Pub.L. 97-473, Title III, §§ 301(a), 302(b), Jan. 14, 1983, 96 Stat. 2611, 2613; Pub.L. 98-397, Title I, § 104(b), Aug. 23, 1984, 98 Stat. 1436.)

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No. 89-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR LISTER,

Petitioner,

v.

H. ALLAN STARK, JAMES NUGENT,
SUN ELECTRIC CORPORATION
and SUN ELECTRIC PENSION TRUST,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ALAN S. GILBERT
Counsel of Record

JAY CONISON
SONNENSCHEIN NATH & ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

Attorneys for Respondents

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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RULE 29.1 LISTING

Sun Electric Corporation has no parents. Its only subsidiary that is not wholly-owned is Vehicle Test Technology, Inc., of which Sun Electric Corporation owns 50%.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Seventh Circuit's opinion in this case.

ADDITIONAL STATUTES INVOLVED

ERISA § 3(7), 29 U.S.C. § 1002(7), provides that:

> The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may

> become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), provides that:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> * * *
>
> (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

STATEMENT OF THE CASE

Arthur Lister ("Lister") sued the Sun Electric Corporation ("Sun"), the Sun Electric Corporation Pension Trust ("Trust"), and two trustees of the Trust in state court for fraud and breach of contract, claiming that his pension benefits under the Sun Electric Corporation Pension Plan (the "Plan") were incorrectly calculated.

Lister's action was based on his allegation that employees of Sun, the "agent authorized to administer the Plan", had orally represented to him during a break in his Sun employment that he would receive certain service credits unavailable under the written terms of the Plan. Lister prayed in his Complaint for a declaration that he is entitled to

> uninterrupted service credit for the period from July, 1964 to January, 1971 for the purpose of calculating his pension benefits. (Pet., App. 15)

Defendants removed the action to the United States District Court for the Northern District of Illinois, and moved for dismissal because ERISA preempted Lister's state law claims for increased pension benefits and because ERISA provided Lister no cause of action for pension benefits based upon oral representations. Lister then moved for remand of the action to the state court. The District Court denied the motion for remand, dismissed the complaint with prejudice, and entered judgment against Lister.

The United States Court of Appeals for the Seventh Circuit affirmed the District Court's judgment, holding that (1) removal was proper because Lister's claims for increased pension benefits were completely preempted by ERISA, since they could have been brought under ERISA's civil enforcement provisions, and (2) Lister's case was properly dismissed with prejudice because his state law claims were preempted by ERISA and because "ERISA does not recognize the validity of an oral modification of a pension plan." (Pet., App. 6 - App. 8, App. 9)

SUMMARY OF ARGUMENT

The question Lister wishes to present was not raised or decided in the proceedings below, and the record does not contain the necessary predicate for determining that question. Even if that question were properly raised, there is no conflict in the Courts of Appeals that requires resolution by this Court.

REASONS FOR DENYING THE WRIT

A. PETITIONER'S QUESTION WAS NOT RAISED OR DECIDED BELOW AND THE RECORD DOES NOT CONTAIN THE PREDICATE FOR DETERMINATION OF THE QUESTION.

The sole Question Presented in the petition (p. i) is whether Lister's state law claim for "uninterrupted service credit" should escape preemption because of the supposed fact that he was not a "member" of the Plan at the time of the alleged oral representations.

Lister did not present this question to the District Court or the Court of Appeals, and the record does not provide the predicate for determination of that question by this Court.

(1) Lister presented the following question to the Seventh Circuit:

> Whether the lower court erred in granting defendants' Motion to Dismiss and denying plaintiff's Motion to Remand on the ground that plaintiff's claims are pre-empted by ERISA, even though: (1) plaintiff's claims do not have any impact on the construction or operation of the Sun Electric Pension Plan and (2) plaintiff may have no remedy under ERISA. (Plaintiff's Brief to the Seventh Circuit Court of Appeals, p. iv.)

Lister never argued below that his state-law claim was not preempted because of his status when the alleged representations were made. He merely argued that the claims were not preempted because the oral statements had been made by Sun representatives supposedly acting in their corporate rather than in their Plan capacities. Lister focused the Court of Appeals on the capacity of the persons who made the statements rather than on his

status at the time the statements allegedly were made. Hence, the Seventh Circuit did not decide the Question Presented here. Consequently, that Question cannot be raised here. *Delta Air Lines, Inc. v. August*, 405 U.S. 346, 362 (1981); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

(2) Lister's factual allegations, moreover, do not permit the formulation or the resolution of the Question Presented. Lister did not assert, either in his complaint or in any of the memoranda filed in the District Court, that he was not a Plan participant at the time of the alleged oral representations, the necessary predicate for determining the Question Presented.[1] He asserted only that he was then a former employee of Sun. Yet, a former employee may well be a plan participant. ERISA § 3(7), 29 U.S.C. § 1002(7). *See Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 958 (1989).

The lower courts did not decide, or even assume, that Lister was not a participant in the Plan when the alleged misrepresentations were made. Thus, any review by this Court would have to be accomplished without the benefit of lower court consideration of that predicate question.

This Court should not hear a question that has not been considered below, particularly, where, as here, that question necessarily involves a predicate mixed question of fact and law—whether Lister was a plan participant when the alleged representations were made—that also has not been considered below.

---

[1] In his appellate brief, Lister passingly mentioned, without record citation, that he was not a participant in the Plan at the time of the alleged oral representations. However, he never raised this as a ground for the Court of Appeals to allow him to proceed with his state law claims.

B. THERE IS NO CONFLICT AMONG THE CIRCUITS REQUIRING RESOLUTION BY THIS COURT.

Of the three allegedly conflicting Court of Appeals decisions Lister presents in the petition (p. 5), only one was decided after this Court's controlling decision in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). In that case, *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3528 (U.S. 1990), the plaintiff was not, like Lister, seeking "plan benefits or an increase in plan benefits". 872 F.2d at 162. Rather, plaintiff sought to rescind his participation in the plan and to recoup payments made to the plan on his behalf. The Sixth Circuit found such remedies unavailable under ERISA's enforcement provisions and thus held ERISA did not preempt plaintiff's claim. *Perry* does not conflict with the Seventh Circuit's decision. Unlike the plaintiff in *Perry*, Lister seeks increased pension benefits for which ERISA § 502(a)(1)(B) provides a remedy. Such a claim is clearly preempted under *Metropolitan Life*. (Pet. at App. 4 - App. 5)

The two Ninth Circuit cases that Lister claims create a conflict, while decided before *Metropolitan Life*, are consistent with both *Metropolitan Life* and the Seventh Circuit's decision here. The claims found not preempted in *Scott v. Gulf Oil Co.*, 754 F.2d 1499 (9th Cir. 1985), were based upon the plaintiffs' allegation that their ex-employer prevented their new employer from establishing an ERISA plan. The plaintiffs did not and could not seek benefits from the new employer's non-existent plan, and, thus, the Ninth Circuit held ERISA inapplicable.[2] *Freeman v.*

---

[2] The Ninth Circuit, however, found tort claims, like Lister's, for increased benefits under the ex-employer's plan to be preempted by ERISA. 754 F.2d at 1505-06.

Jacques Orthopedic & Joint Implant Surgery Medical Group, 721 F.2d 654 (9th Cir. 1983), was brought by an employee who sought to void his waiver of participation in an ERISA plan. Unlike Lister, Freeman never was a participant in the plan in question, and thus had no claim for benefits under the plan. The Ninth Circuit held that ERISA did not provide Freeman a procedural remedy and thus no federal claim was stated.

This is a simple case for increased pension benefits that can be brought under ERISA's civil enforcement provisions. It is controlled by *Metropolitan Life*. There is no conflict between this case and any other Court of Appeals case, notwithstanding petitioner's attempt to formulate a new question for the first time before this Court.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALAN S. GILBERT
Counsel of Record

JAY CONISON
SONNENSCHEIN NATH & ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

Attorneys for Respondents

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARTHUR T. SUSMAN
Counsel of Record
TERRENCE BUEHLER
SUSMAN, SAUNDERS & BUEHLER
Two First National Plaza
Suite 620
Chicago, Illinois 60603
(312) 346-3466

JOSEPH S. BUEHLER
FRANKS & FILLER
19333 East Grant Highway
P.O. Box 5
Marengo, Illinois 60152
(815) 923-2107

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PETITIONER'S QUESTION WAS RAISED AND DECIDED BELOW—IT WAS CENTRAL TO THE DECISIONS BY BOTH THE DISTRICT COURT AND THE SEVENTH CIRCUIT COURT OF APPEALS.

The issue raised by Arthur Lister's Petition for Certiorari to this Court is simple and straightforward. In 1971, Lister was induced to return to work for the Sun Electric Corporation ("Sun Electric" or the "Company") because he was promised service credit for the six years

he had worked for the Company previously. When he retired eleven years later, the Company refused to honor this promise. The district court and the circuit court dismissed Lister's suit, holding that ERISA preempted his claims for fraud and breach of contract. In his petition for certiorari, Lister seeks to have this Court review the decision by the Seventh Circuit Court of Appeals dismissing his state law claims on the ground that ERISA preempts those claims, even though he was not a member of the Sun Electric Pension Plan at the time the promises were made to him.

Respondents' principal argument in opposing the Petition is that Lister failed to present this issue in the court below. This contention is just plain wrong. The central issue in this case and the basis for this petition for writ of certiorari is the fact that the unfulfilled promises were made to Lister before he was a member of the Sun Electric Pension Plan.

In Paragraph 9 of the Complaint, Lister laid the predicate for his claim as follows:

> "9. As an inducement to return to the employ of Sun Electric, plaintiff was promised by the Company that, with respect to employment benefits, he would receive credit for uninterrupted service with the Company beginning in 1964. He was also promised that he would not be treated as a new employee upon his return to the Company in 1971."

Consistent with this, in the brief filed in opposition to defendants' motion to dismiss in the district court, Lister set forth his position as follows:

> "Mr. Lister does not challenge the terms of his pension plan and does not question its benefits administration. His suit will have no impact on the Congressional purposes or policies set forth in ERISA. He

> seeks damages from the Company for its refusal to honor its promise to him to credit him with uninterrupted service covering his first years of employment with the Company."

Similarly, in the court of appeals, Lister summarized his position as follows:

> "First, plaintiff's claims are not preempted because they do not challenge either the terms of the pension plan or its administration, *i.e.*, plaintiff's claims are not related to a retirement plan. Lister simply seeks damages from Sun Electric for the service credit he was promised but did not receive. While the damages sought by him are based on a longer period of employment and calculated according to the terms of the pension plan, the damages were occasioned by Sun Electric's wrongful conduct, and recovery will be from the Company, *not* the Plan."

Throughout these proceedings, defendants have chosen to ignore the fact that Lister's claims are based on promises made before he was a member of the Plan. Lister brought this to the attention of the Seventh Circuit in his reply brief as follows:

> "Throughout its responding brief, the Company characterizes Lister's claim as a challenge to his benefit calculation by plan fiduciaries. In so doing, the Company purposefully ignores the essential nature and character of Lister's claims. Lister seeks to enforce against the Company a promise made to him by the Company when he was not yet a plan participant. It was the Company that caused Lister's injury and, therefore, is liable for damages, to be measured by the benefit formula in the plan documents. To eliminate any ambiguity in the Complaint that this lawsuit is against the Company, Lister stated his intention to amend his complaint by dropping the pension trust defendants after this action is remanded to Illinois state court."

This point was reiterated in the argument section of the Reply Brief:

> "Having characterized Lister's claim as one brought against plan fiduciaries for a recalculation of benefits and noting that ERISA's pre-emption is broad, the Company then moves easily to the conclusion that the claim must be pre-empted because it "relates to" a benefits plan. (Resp. Br. pp. 4-8). Stating the problem this way ends the inquiry. The issue properly stated is: does Lister's claim for damages against the Company based on a promise made to him before he was a plan participant "relate to" the terms or administration of the benefits plan. If Lister prevails, his damages will be computed by reference to the plan's formula, but the damages will be paid by the Company, not the plan."
>
> * * *
>
> "The Company has failed to explain why Lister's claim against the Company for damages based on the Company's refusal to honor its promise to Lister, who was not a plan participant at the time, "relates to" the plan in any meaningful way."

Lister's claims are based on the fact that certain promises were made to him *before* he was a member of the Plan. Thus, the issue raised by Lister's petition for a writ of certiorari was precisely the issue raised and decided by the lower courts. The issue has, therefore, been properly raised and preserved for review by this Court.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

ARTHUR T. SUSMAN
Counsel of Record
TERRENCE BUEHLER
SUSMAN, SAUNDERS & BUEHLER
Two First National Plaza
Suite 620
Chicago, Illinois 60603
(312) 346-3466

JOSEPH S. BUEHLER
FRANKS & FILLER
19333 East Grant Highway
P.O. Box 5
Marengo, Illinois 60152
(815) 923-2107

Attorneys for Petitioner

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